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July 11, 2013

BY FEDERAL EXPRESS AND E-MAIL
Eaton R. Weiler
Assistant Regional Counsel
USEPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590

Re: Our Client: Canton Drop Forge
January 22, 2013 Notice of Violation (NOV)

Dear Mr. Weiler:

The purpose of this letter is to reaffirm the offer I extended on behalf of Canton Drop Forge (CDF) to USEPA during our telephone conversation of May 28, 2013 and to explain further CDF's position.

Our client, Canton Drop Forge (CDF), is willing to resolve the Notice of Violation (NOV) issued by USEPA on January 22, 2013 by entering into a mutually acceptable administrative order by consent. We believe that by resolving the NOV, and at the same time continuing on a parallel track with completing the site investigation and cleanup initiated by CDF in 2012 under the Ohio Voluntary Action Program (VAP), USEPA, Ohio EPA and CDF can all support a solution that advances protection of the environment using private dollars. CDF began the process of site investigation in July 2012 in connection with a proposed sale of the company proposed for year-end. USEPA's August 6-8, 2012 inspection had no relation to the initiation of these voluntary activities.

In order to move the ball forward with negotiating an administrative order by consent to resolve the NOV, we ask that USEPA give consideration to the analysis set forth below. The analysis is for the purpose of engaging USEPA in a more detailed discussion of its regulations and their applicability to the facts of this case. Regardless of USEPA's agreement or disagreement with this analysis, CDF stands ready to meet with USEPA, at your earliest convenience, to discuss the content of an administrative

order by consent. Because Ohio EPA informed us that it is in discussions with USEPA concerning a Memorandum of Agreement that could affect CDF's activities under the VAP, we are supplying a copy of this letter to Ohio EPA to keep them informed.

With respect to USEPA's January 22, 2013 NOV, we respectfully submit that that the regulatory analysis for violation number 2 is incorrect. The NOV alleges that "CDF manages and stores used oil in two surface impoundments, designated as Ponds 1 and 2." NOV at p. 2. It further states that CDF was prohibited from allegedly storing or managing used oil in a surface impoundment unless it is operating under a hazardous waste permit or is under interim status. *Id.*; *see also* June 17, 2013 letter from USEPA to K. Burke, at p. 1.

A correct analysis of the used oil regulations as applied to this case results in the conclusion that there was, in fact, no management or storage of used oil in surface impoundments, and that CDF was responding to releases of used oil to Ponds 1 and 2, as specifically required by 40 C.F.R. § 279.22(d).

Background to Regulatory Analysis

In the 1940s, the U.S. Army owned the current CDF facility as part of the war effort, and constructed over a period of time industrial wastewater treatment Ponds 1, 2, and 3. When CDF purchased the facility from the United States, it continued the same forging process, which uses a high volume of water, and continued using Ponds 1, 2, and 3 for its industrial wastewater treatment. The wastewater in Pond 1 was pumped from the bottom to Pond 2, then Pond 2 was pumped from the bottom to Pond 3, which has no discharge. *See* May 18, 1992 letter from PRC to USEPA ("Three manmade, unlined, active lagoons at the CDF site are used to collect and treat plant process wastewater.") at p. 2.

In the forging process at CDF, lubricating oil ("die lube") is used to lubricate the dies and other metal surfaces being hammered. The oil is caught in the floor drain and piped to the oil/water separator (OWS), which is referred to as a "used oil tank" in the NOV at p. 1. The OWS separates the used oil stream from the wastewater stream. The wastewater stream is piped to Pond 1 or Pond 2. The second used oil tank referenced in the NOV is an aboveground tank near Pond 2 that collects and temporarily stores used oil from Pond 2's rope skimmer until it is regularly reclaimed at an off-site reclaimer (*see* NOV at p. 1).

From the beginning to the end of the forging process at CDF, used oil is never mixed with a RCRA hazardous waste. Moreover, CDF does not conduct any used oil processing or re-refining at its facility. CDF only arranges for a company to pick-up and reclaim its used oil (die lube) at the reclaimer's off-site location.

During significant rainstorm events, the volume of process wastewater and stormwater that flowed to the OWS periodically exceeded the hydraulic capacity of the OWS. *See, e.g.*, Feb. 20, 2013 CDF letter to USEPA, at p. 3. (As you know from our communications to you,[1] the OWS is being replaced to increase its hydraulic capacity and efficiency.) The overflow during such precipitation events resulted in a release of used oil to the process wastewater in Ponds 1 and 2, as was intended to prevent the uncontrolled release of used oil to the environment. Fortunately, such releases of used oil were contained by the wastewater ponds, which do not discharge to surface waters, and are continuing to be cleaned up at this time under the Ohio VAP. *See, e.g.,* 40 C.F.R. § 112.8(b)(3) ("Design facility drainage systems . . . to flow into ponds, lagoons, or catchment basins designed to retain oil . . .").

Regulatory Analysis

On September 20, 1998, the Federal Used Oil regulations (40 C.F.R. Part 279) promulgated pursuant to RCRA, 42 U.S.C. § 6935, became effective in Ohio.

Part 279, as applicable, identifies requirements for used oil: generators, collection centers, transporters, processors and re-refiners, burners, fuel marketers, and use as a dust suppressant. 40 C.F.R. §§ 279.1-279.82. The analysis starts and ends with the rules applicable to used oil generators. 40 C.F.R. §§ 279.20-279.24. For the purpose of this letter, CDF does not dispute that it is a used oil generator (*see* 40 C.F.R. § 279.1). Section 279.20 applies to all used oil generators. 40 C.F.R. § 279.20(a). Used oil generators are permitted to:

> "(B) *Separat[e] used oil from wastewater generated on-site to make the wastewater acceptable for discharge or reuse pursuant to* Section 402 or Section 307(b) of the Clean Water Act or other applicable federal or *state regulations governing the management* or discharge *of wastewater;*"
>
> and
>
> "(D) Drain or otherwise remov[e] used oil from materials containing or otherwise contaminated with used oil in order to remove excessive oil to the extent possible pursuant to § 279.10(c) . . .."

40 C.F.R. § 279.20(b)(2)(ii)(B) and (D) (emphasis added).

The Agency's analysis is based upon an incorrect assumption that CDF's wastewater treatment Ponds 1 and 2 are surface impoundments (*see* NOV at p. 2). For over 50 years, Ponds 1 and 2 have indisputably been industrial process wastewater

[1] *See, e.g.,* CDF's Response to USEPA's Information Request dated May 7, 2013.

treatment ponds, and no federal or state agency has ever informed CDF that its industrial wastewater system was going to be deemed "surface impoundments."[2] State regulations govern the 1940s-constructed wastewater treatment system. *See* Ohio Rev. Code § 6111.01(F) ("'treatment works' means any . . . lagoons, . . . building sewer connected directly to treatment works . . . or other works used for the purpose of treating . . . or holding . . . industrial wastewater or other wastes . . .."); § 6111.01(J) ("'industrial water pollution control facility' means any . . . treatment works, . . . equipment, machinery, pipeline or conduit, pumping station, . . . or installation constructed, used or placed in operation for the purpose of collecting or conducting industrial waste to a point of . . . treatment; reducing controlling, or eliminating water pollution caused by industrial waste . . ."); *see* Ohio Admin. Code § 3745-42-08 and Table A-1. Used oil generators are permitted to "separat[e] used oil from wastewater generated on-site" if "state regulations gover[n] the management . . . of wastewater." That is the case here. It is incorrect to characterize the 50-year old series of industrial process wastewater treatment ponds as surface impoundments used to store used oil.

Used oil generators are subject to the following storage rules:

> "(a) Storage units. Used oil generators shall not store used oil in units other than tanks, containers, ..."

40 C.F.R. § 279.22(a). As noted in the NOV, both of the used oil storage units referred to (the OWS tank and the rope skimming tank) constitute the *only* used oil storage units at issue.

> "(b) Condition of units. Containers and aboveground tanks used to store used oil at generator facilities must be:
>
> (1) In good condition (no severe rusting, apparent structural defects or deterioration); and
>
> (2) Not leaking (no visible leaks)."

Id. at § 279.22(b)(1), (2). In our case, the NOV takes no issue with the condition of the two tanks. Both were in good condition and were not leaking at the time of the inspection.

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[2] Fundamental due process principles require that a regulation must give fair notice of what conduct is mandatory or prohibited. *See, e.g., FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012). The interpretation of the Used Oil Generator regulations in a way that ignores the 50-year long operational history of a 3-pond series industrial wastewater system, governed by state law, and for the first time deems them to be "surface impoundments" in an NOV to CDF is "so far from a reasonable interpretation of the regulations [that it] is unlawful." *General Electric Co. v. USEPA*, 53 F. 3d 1324, 1330 (C.A.D.C. 1995).

For containers and other aboveground tanks, the Used Oil Generator rules "establish new requirements for responding to releases under RCRA section 3014 . . .." 57 Fed. Reg. 41566, 41583 (Sept. 10, 1992).

> "(d) Response to releases. Upon detection of a release of used oil to the environment . . . and which has occurred after the effective date of the recycled used oil management program in effect in the State in which the release is located, a generator must perform the following steps:
>
> (1) Stop the release;
>
> (2) Contain the released used oil;
>
> (3) Clean up and manage properly the released used oil and other materials; and
>
> (4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service."

Id. at § 279.22 (d)(1)-(4) ("Used Oil Generator Cleanup"). Of the two tanks at issue in the NOV, only one of them, the OWS tank, had releases of used oil to the two wastewater ponds during storm events. Currently, CDF is in the process of cleaning up used oil releases to Ponds 1 and 2 to meet or exceed the Used Oil Generator Cleanup requirements as the cleanup under Ohio VAP has already commenced and continues. As the preamble to the Used Oil Generator regulations expressly states, *there is no closure standard for used oil generators*. 57 Fed. Reg. at 41584 and 41588 (emphasis supplied); *see also* 40 C.F.R. Part 279 (no closure requirements for used oil generators). Consistent with the absence of closure procedures for used oil generators, the Agency also notes: "the response to release provision does not require cleanup of past releases to the environment which occurred prior to the effective date of the used oil program within an authorized state . . . [Ohio - 10/20/98]." 57 Fed. Reg. at 41586.

It is therefore an incorrect analysis, both factually and legally, to characterize releases of used oil to wastewater ponds as the management, storage or disposal of used oil in a surface impoundment subject to hazardous waste closure requirements. USEPA's announcement for the first time in its NOV that a decades-old 3-pond series wastewater treatment system will be ignored and re-framed as a surface impoundment is an implausible dismissal of the over 50-year factual history of the facility's wastewater operations. USEPA's regulations set the standard (*see, e.g.* 40 C.F.R. § 279.20(b)(ii)(B)) (used oil generator is allowed to separate used oil from wastewater generated on-site) and 40 C.F.R. § 279.22(d) (used oil generator must respond to used oil releases as identified) and cannot be ignored. *Bloate v. U.S.*, 559 U.S. 196, 206 (2010); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) ("It is

one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretation in advance or else be liable when the agency announces its interpretation for the first time in any enforcement proceeding and demands deference."). Further, nothing in the Used Oil Generator regulations "bumps up" a wastewater pond to a "surface impoundment" because of releases of used oil. *See* 40 C.F.R. § 279.22(d)(1)-(4). USEPA's conclusions in the NOV overlook the due process obligation to give fair notice of what is prohibited before assessing civil penalties for an alleged violation. *See, e.g.*, *FCC*, 132 S. Ct. at 2317 ("The requirement of clarity in a regulation is essential to the protection provided by the Due Process Clause of the Fifth Amendment,"); *General Electric v. USEPA*, 53 F. 3d at 1330.

CDF continues to this day to implement the requirements of responding to releases of used oil as identified in the Used Oil Generator Cleanup regulations. 40 C.F.R. § 279.22(d)(1)-(4). Indeed, CDF's Ohio VAP cleanup, when completed, will result in a more stringent, quantitatively-based remediation than the qualitative cleanup triggered by section 279.22(d)(1)-(4).

Finally, the regulatory analysis in NOV number 3 is also incorrect. The NOV alleges that the used oil on the sides and bottom of Ponds 1 and 2 is "waste" that was not tested to determine if such used oil was a RCRA hazardous waste. NOV at p. 2. The used oil that reached Ponds 1 and 2 was a result of a used oil release and is not "waste." *See* 40 C.F.R. § 279.22(d). A used oil generator is required to respond to the release, as discussed above, as mandated by the Used Oil Generator Cleanup regulations at § 279.22(d)(1)-(4). *See also* 40 C.F.R. § 279(b)(2)(ii)(D) (used oil generators are allowed to remove used oil from materials contaminated with used oil, such as soils). As part of a "response to a release," the regulations do *not* require a re-testing of the released used oil. *Id.* As you know from our communications with the USEPA, CDF is in the process of cleaning up the oil-contaminated sides and bottoms of Ponds 1 and 2. As part of the protocols for the investigation/cleanup, the oil contaminated side soils and bottoms have, in fact, been tested and characterized as non-hazardous under RCRA. *See, e.g.*, Feb. 20, 2013 letter at pp. 3, 5-6. Therefore, we request that NOV number 3 be withdrawn.

In summary, there has been no management of used oil at the facility other than as mandated through the Used Oil Generator regulations. We respectfully request that USEPA give consideration to the facts and analysis set forth above, and revisit the analysis set forth in the NOV.

Please contact me at your earliest opportunity to set a date and time for a settlement meeting if USEPA is interested in resolving the NOV by administrative order by consent. Thank you.

Sincerely yours,

Kim K. Burke /mdw

Kim K. Burke

c: Mark Navarre, Ohio EPA Legal